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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 1 etc.

OLIVER BROWN, ET AL.,
Appellants,
v.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL.,
Appellants,
v.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
Appellants,
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,
v.
ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF ARKANSAS

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PRELIMINARY STATEMENT

This brief is filed by the Attorney General of the State of Arkansas as *amicus curiae* at the invitation of this Court in the four cases shown in the caption. For brevity and convenience, the four cases are referred to collectively as "the *Brown Case*". *Brown* v. *Board of Education of Topeka, Shawnee County, Kansas*, 347 U. S. 483.

In the *Brown Case*, the Chief Justice, speaking for the unanimous Court, stated the issue presented to the Court in the four cases as follows, 347 U. S. at 493:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"

The Court decided that issue in the following language, 347 U. S. at 495:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Let it be said at the outset that nothing contained in this brief is intended to bring into question the correctness of the ruling of this Court or its reasons for reaching that conclusion.

The full force and effect of the decision in the Brown Case was recognized by a "policy statement" issued by the State Board of Education of Arkansas following a meeting of the Board on June 14, 1954. The policy statement of the Board is as follows:

> "Under our present law the State Board of Education acts only in an advisory capacity to local school boards. The local board itself is the governing body of the school district and its decisions are final. Therefore, decisions must be made by the local school board, but within the limitations and restrictions provided by law. Our present state law provides for segregation in the public schools and any decision by a local board providing for integration of the races is premature, as the Supreme Court in its opinion stated that further arguments would be heard and a decree entered. We do not know when the decree will be entered or what it will provide. In the meantime, members of both races at the community level should continue as they have in the past in working cooperatively and effectively in a friendly effort to achieve better and substantially equal schools for all children, without regard to race.

> "It is important to keep in mind that policy decisions are made by local school boards. The public school system in America calls for local control of schools and the state functions in the area of leadership only in such vital statewide matters as the one involving segregation of the races."

The General Assembly of Arkansas (the constitutional legislative branch of Arkansas' government) has not been in session since March of 1953 and will not convene in regular session until January of 1955. Without anticipating what action, if any, the General Assembly of Arkansas will take in its 1955 session, it is probably safe to say at this time that some further words of advice and direction from this Court will go a long way toward charting the course of future action or inaction by the Arkansas General Assembly. One of the purposes of this brief is to solicit most earnestly from this Court such words of clarification and advice as to the course to be pursued by the people of Arkansas in carrying out the final mandate of the Court as may be proper.

PERTINENT ARKANSAS CONSTITUTIONAL AND STATUTORY PROVISIONS

Ark. Const. (1874) Art. 14, §1, provides:

> "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

Ark. Const. (1874) Art. 14, §4, provides:

> "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The first general law providing for the separation of white and negro children in the public schools of Arkansas was enacted on July 23, 1868 — the year of adoption of the Fourteenth Amendment to the United States Constitution. The act provided that school boards in Arkansas shall "make the necessary provisions for establishing separate schools for white and colored children and youths . . . ." Act 52, Ark. Acts of 1868.

In 1873 the Arkansas school law of 1868 was re-enacted and Act 130, Ark. Acts of 1873, §108, provided for "establishing separate schools for white and colored children and youths." According to a contemporary newspaper, there were twenty negro members in the 1873 session of the Legislature and it was reported that "that one-fifth part is a complete master of the two houses, as if the number that composed the group were three times as great." Editorial, "The Colored Legislators," Arkansas Gazette, February 1, 1873, p. 2.

It is also interesting to note that on January 6, 1873 (the year during which the Arkansas school laws were being formulated), J. C. Corbin became State Superintendent of Public Instruction for Arkansas. He was a negro educator who came to Arkansas during the War between the States. See Weeks, "School History of Arkansas." (U. S. Bureau of Education Bul. No. 27, 1912) pp. 59, 117.

The only statutory law in Arkansas today on the separation of white and negro children in the Arkansas public school system provides:

> "The board of school directors of each district in the State shall be charged with the following powers and perform the following duties . . . (c) Establish separate schools for white and colored persons." Ark. Stats. (1947) §80-509.

The existing school segregation law in Arkansas, therefore, apparently had its origin at a time when the negroes in Arkansas greatly influenced, if not dominated, legislative action on the school question.

FACTUAL BACKGROUND

Attached hereto as Appendix "A" appears a tabulation which shows pertinent information as to the various school districts of Arkansas. The purpose of this tabulation is to demonstrate the proposition that the wide variety of circumstances which exist in the various counties of Arkansas requires a wide variety of remedies and plans in bringing about the ultimate result demanded by the decision of this Court, that is, the abolition of the dual school system in Arkansas.

There are 75 counties in Arkansas. The tabulation shows there are 422 separate school districts in the State or an average of about five separate districts for each county. Each school district has its separate board of directors which is the immediate governing authority of the district. The members of the board are elected by the qualified electors of the district and they are directly responsible to the people for their actions.

It is of interest to note that there are 14 counties out of the total 75 counties which had no negroes enrolled in the public schools of the county. Ten of the counties without negro population are located in the north and northwest (mountain) section of the State. Two of the non-negro counties (Polk and Scott) are in the southwestern section of the state. The remaining two non-negro counties (Clay and Greene) are contiguous to Mississippi County to the east which had a negro enrollment of 4,789 or about 20% of the total enrollment for Mississippi County.

By way of contrast, it will be seen from Appendix "A" that in six counties in Arkansas the negro enrollment exceeded the white enrollment. Five of these predominately negro counties (Lee, St. Francis, Crittenden, Chicot and Phillips) are in the eastern section of the State and border the Mississippi River. The other predominately negro county (Lincoln) is in South-central Arkansas.

The tabulation shows that the negro enrollment for the State was about 23% of the total enrollment of the State.

As further evidence of the variety of conditions and circumstances in Arkansas, it should be noted that two districts in Arkansas have already integrated the white and negro children in the schools.

The Charleston School District in Western Arkansas (Franklin County) has integrated pupils during the 1954-1955 session from the first grade through the twelfth grade. The Fayetteville School District in Northwest Arkansas (Washington County) has an enrollment of 3,096 white pupils and 64 negro pupils. This district has integrated the negro and white pupils at the high school level. Negro children in the Fayetteville School District attend a segregated school from the first grade through the ninth grade. For the 1954-1955 session, 11 negro high school pupils are attending the same high school with approximately 500 white children.

It is a matter of general information that integration has been accomplished so far in the Charleston and Fayetteville School Districts without any unusual incidents. However, from a comparison of the factual situations of the Charleston and Fayetteville School Districts with, for example, districts in St. Francis and Phillips Counties, it would certainly seem to follow as a matter of necessity that the process of integration must be applied as the circumstances in each district may require.

ARGUMENT

1. This Court should not order "forthwith integration" in the public schools.

2. This Court should enter a decree in the pending cases which will permit gradual adjustments.

3. The Court should leave the problem of integration of the races in public schools to Congress for appropriate legislation.

Point 1

This Court Should Not Order Immediate Integration

This Court in its opinion in the *Brown Case* clearly recognized that the procedure for integration of the races in the public schools "presents probllems of considerable complexity." Thus the Court has indicated that it is not unmindful of the possibility of widespread hostility in at least some school districts if immediate integration of the races in the public schools is required by this Court. This hostility is commonly known to exist in varying degrees in a majority of the school districts of Arkansas although there have been, so far as is known, no overt acts by any particular group or groups indicating open defiance of the law as declared by this Court.

But even unwilling or hostile compliance can, and probably would, have a most undesirable effect upon the whole system of public education in Arkansas. It will be conceded, presumably, that the bulk of the financial support for the public school system of Arkansas flows from the white population. This fact will continue to be true for many years to come unless a large portion of those persons who now pay taxes in support of public schools manage, by some means not now forseeable, to withdraw their

support as a result of legislative enactments of some kind or other.

Without the leadership of those who carry the large portion of the burden of supporting the school system, the system as a whole is bound to pass through a period of deterioration which might last for many, many years. If the public school system is permitted to deteriorate, it necessarily follows that both the negro children and the white children will be the unfortunate victims. The negro children in all probability will suffer to a greater degree than the white children in such circumstances.

The Arkansas public school system today ranks far down the list in many respects in comparison with the systems of other states. There is a long way to go before Arkansans can point with pride to their school system as a whole. But no well-informed person will seriously contend that Arkansas has not made measurable progress during the past few years. Every well-informed person in Arkansas agrees with this Court when it said that "today, education is perhaps the most important function of state and local governments" and education "is the very foundation of good citizenship." *Brown Case, supra.*

The executive, legislative and judicial branches of the State government have for years pointed up the school problem as the most important problem confronting the people of this State. It is well within the realm of possibility that any decree of this Court at this time which would have the legal effect of ordering immediate integration of the races in all the school districts of Arkansas would disrupt the financing, management and control of the school system for many years.

A recognized authority on the sociological aspects of school segregation has said:

> "Finally, there is the hard fact that integration in a meaningful sense cannot be achieved by the mere physical presence of children of two races in a single classroom. No public school is isolated from the community that supports it, and if the very composition of its classes is subject to deep-seated and sustained public disapproval it is hardly likely to foster the spirit of united effort essential to learning. Even those who are dedicated to the proposition that the common good demands the end of segregation in education cannot be unaware that if the transition produces martyrs they will be the young children who must bear the brunt of spiritual conflict." Ashmore, "The Negro and the Public Schools," (Chapel Hill 1954) p. 135.

It would unduly extend this discussion to take up the problems of grade requirements, transportation problems, revision of school area distribution and the many other complex management problems which will ultimately have to be solved in bringing about complete integration in Arkansas. This Court has already indicated by the opinion in the *Brown Case* and by the study which the Court has obviously given to these cases that it is fully aware of the complexity of the problem. This Court has not asked for a statement of the problem, but rather for a solution.

What has been said is, of course, addressed to the discretion of this Court in the exercise of its equity powers in the four cases now pending before it. It is believed that this complex problem can be solved most effectively and most satisfactorily in the interest of both the negro children and the white children by a gradual, rather than an immediate, adjustment or transition from segregation to integration of the races in the public schools.

There are, of course, many decisions of this Court pointing out the peculiar nature of equity practice. In the interest of brevity, it is appropriate to point to the

opinion of Mr. Justice Douglas in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329, where the Court said:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity', *Meredith* v. *Winter Haven*, 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs as well as between competing private claims."

This Court also held in *International Salt Co.* v. *United States*, 332 U. S. 392, that district courts are invested with large discretion in modeling their judgments to fit the exigencies of the particular case, and the framing of decrees should take place in the district rather than appellate courts.

Point 2

The Court Should Enter a Decree in the Pending Cases Which Will Permit Gradual Adjustments

The pending cases have been designated as class actions by the Court. The principal matter about which the people of Arkansas are concerned is the binding effect of the impending decrees on prospective or pending litigation of similar nature in the federal courts of Arkansas.

It is believed that the decree of this Court in the *Briggs Case*, for example, would not have the effect of an adjudi-

cation of pending or prospective similar actions in the federal courts of Arkansas. That decree would be a precedent to be followed by the federal courts in Arkansas only to the extent that the *Briggs* decree would permit the federal court in Arkansas in equity to follow the procedural scheme provided for in the *Briggs* decree.

The ultimate solution of the complex problem of transition is undoubtedly one which calls for "flexibility rather than rigidity." *Hecht Co.* v. *Bowles, supra.*

In framing its decrees in the pending cases, it is deemed proper for this Court to consider the opinion of Judge Harry J. Lemley in *Pitts* v. *Board of Trustees of DeWitt Special School District No. 1*, 84 F. Supp. 975 (E. D. Ark.). That case asserted the rights of negro plaintiffs to equal public school facilities under the Fourteenth Amendment to the United States Constitution. The Court followed the "separate but equal doctrine" of *Plessy* v. *Ferguson*, 163 U. S. 537, and held that the negro children were entitled under the Amendment to school facilities substantially equal to the school facilities afforded white children. Judge Lemley was there confronted, as the Court is here, with the terms and the scope of the decree to be entered under his findings of fact and conclusions of law. In solving this perplexing problem, Judge Lemley said, 84 F. Supp. at 983:

> "The instant suit is one in equity, and the bill is addressed to the court sitting as a court of equity. Hence the court has a wide discretion in determining what relief is proper and prescribing the time within which such relief must become effective. The case at bar is not the only one of this nature upon the court's docket and, in connection with our discussions and holdings herein, it should be borne in mind that each of these cases stands on its own peculiar facts; relief which might be proper in one

> case might not be sufficient in another, and the length of time allowed to a district within which to bring about an equalization of educational facilities which might be reasonable in one case could be unreasonable in another."

In the same opinion, Judge Lemley further said, 84 F. Supp. at 988:

> "We are not going to attempt to say what a 'reasonable time' in this case will be; that is a matter properly left, for the time being, to the good faith and discretion of the Board. If the Board is dilatory, the plaintiffs are not without their remedy in the Courts."

The problem before Judge Lemley was, in effect, the same as now confronts this Court in the framing of its decrees. Judge Lemley decided that the negro children were entitled to separate but equal facilities. This Court has decided that the negro children in the instant cases are entitled to identical facilities, subject only to classification not based on race. Judge Lemley was confronted with a transition from unequal to equal facilities. This Court is confronted with a transition from separate to identical facilities.

It seems obvious that Judge Lemley adopted the logical and equitable solution of the problem before him. It appears also that this Court could find no better solution of its problem in the instant cases than remanding the four cases to the courts of first instance for adoption, in substance, of the language of Judge Lemley in the *Pitts Case, supra.*

It is contended, therefore, that the Court should enter a decree in each of the pending cases which will read substantially as follows:

"The case is remanded to the court of first instance with directions to enter such orders and decrees as are necessary and proper and not inconsistent with the opinion of this Court in this case. In exercising its jurisdiction upon remand, the court of first instance is left free to hold hearings, through a Special Master of the court if deemed necessary or appropriate, to consider and determine what provisions are essential, proper and appropriate to afford appellants and those similarly situated full protection against segregation of negro children in the public schools solely on the basis of race in violation of their rights under the Fourteenth Amendment to the United States Constitution." *Terry* v. *Adams*, 345 U.S. 461, 470.

POINT 3

The Court Should Leave the Problem of Integration of the Races in Public Schools to Congress for Appropriate Legislation

Even if the Court remands the pending cases with directions as suggested, there still remains the uncertainty of the immediate effect which those decrees may have on prospective cases in the federal courts in Arkansas. The Court must of necessity make some disposition of the pending cases by way of appropriate decrees. In this connection it is most respectfully urged that the Court take some action by way of a supplemental opinion, in addition to the specific decrees, which will have the effect of precluding what might well turn out to be a flood of cases in the federal courts of Arkansas and other so-called "segregated states."

The point here is that this Court can and should deal with the problem by way of supplemental opinion in such a way that the whole problem of solving the method of integration should fall squarely where the Fourteenth

Amendment says it should fall; that is, on Congress for appropriate enactment.

In its opinion of May 17, this Court has definitely and finally decided that the separation of the races in public schools pursuant to state laws on a basis of race violates the Equal Protection Clause of the Fourteenth Amendment. The law having thus been interpreted and declared by this Court for the first time, it now becomes the function and the constitutional duty of Congress to exercise the power granted by Section 5 of the Fourteenth Amendment.

Section 5 of the Fourteenth Amendment is as follows:

> "The congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It might be well to mention at the outset that it is fully recognized that "it is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body," *Collins* v. *Hardyman*, 341 U. S. 651, 663, and that "the judiciary may not, with safety to our institutions, enter the domain of legislative discretion and dictate the means which Congress shall employ in the exercise of its granted power. That would be sheer usurpation of the functions of a coordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government." Mr. Justice Harlan dissenting in *The Civil Rights Cases*, 109 U. S. 3, 51.

Nevertheless, it would certainly not be entirely without precedent for this Court to point out to Congress, as urged here, the necessity for "appropriate legislation"; especially in view of the known fact that the prolonged inaction by Congress has now resulted in a condition which has some aspects at least of a national emergency.

As a matter of pertinent history, it is very significant that the legislative records of Congress in promulgating the Fourteenth Amendment and of state legislatures in ratifying it have very little to say about racial segregation in public schools. It is, however, a matter of record that Senator Charles Sumner of Massachusetts appears to have strenuously but unsuccessfully advocated implementing legislation under Section 5 of the Fourteenth Amendment which would have been a specific and far-reaching proscription of racial segregation in the public schools. *Cong. Globe*, 42 Cong., 2d Sess. 383-84 (1872).

By way of contrast, it is quite obvious from a reading of the Court's opinion in the *Brown Case* that, in arriving at its decision, the Court took full cognizance of contemporary conditions in the field of public education as compared with conditions existing at the time of and for many years subsequent to 1868. This Court said, 347 U. S. 492:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . .
>
> "Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education."

The Court having pointed out so forcibly the evolving concept of the Fourteenth Amendment, it would seem to follow as a necessary conclusion that the Court should now (by way of an additional opinion) not only nudge but even exhort Congress to enact appropriate legislation under the power of Section 5 of the Amendment.

This Court could with complete propriety point out to Congress that legislative action is a necessity and that such necessity is a result of extending inaction by Congress. If Congress responds to the urgent invitation of the Court (and there are many reasons for believing that it will), then it will be performing the mandate of the people which is incorporated in Section 5 of the Amendment.

This Court in *The Civil Rights Cases*, 109 U. S. 3, 11, said that, under Section 5 of the Amendment, Congress is empowered

> "To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous."

And in the same cases this Court said, 109 U. S. 14:

> "It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character."

In his very forceful dissenting opinion in *The Civil Rights Cases*, Mr. Justice Harlan said,

> "The legislation which Congress may enact, in execution of its power to enforce the provision of the amendment, is such as may be appropriate to protect the right granted. The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of this court. Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances, primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained."

The conclusion to be drawn from the decision in *The Civil Rights Cases* is that the "appropriate legislation" contemplated by Section 5 is co-extensive with and just as important a part of the Fourteenth Amendment as is Section 1 which declares the rights of all persons to equal protection under the laws. Therefore, whatever action Congress sees fit to take in the light of this Court's decision would rest upon the judgment of Congress; provided, of course, that such legislation is directed against state action. As Mr. Chief Justice Marshall said in *United States* v. *Fisher*, 6 U.S. 358:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Mr. Justice Frankfurter, concurring in *McCollum* v. *Board of Education*, 333 U. S. 203, 212, said that the case

> ". . . demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." And in the same case, Mr. Justice Jackson, concurring, said, 33 U.S. at 237: 'It is idle to pretend that said, 333 U. S. at 237: 'It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely . . . to make the legal "wall of separation between church and state" as winding as the

> famous serpentine wall designed by Mr. Jefferson for the University he founded.' "

This Court in the *Brown Case* arrived merely at the "formulation of a relevant Constitutional principle." This Court should invoke immediate action by Congress to declare and solve the variations of the controversy which are prevalent in the so-called "segregated states" — particularly in Arkansas.

Again it is appropriate to refer to the opinion of Judge Lemley in his "separate but equal" decision, *Pitts* v. *Board of Trustees*, where he said, 84 F. Supp. at 988:

> "In the last analysis, this case and others like it present problems which are *more than judicial* and which involve elements of public finance, school administration, politics and sociology . . . . The federal courts are not school boards; they are not prepared to take over the administration of the public schools of the several states; nor can they place themselves in the position of censors over the administration of the schools by the duly appointed and qualified officials thereof, to whose judgment and good faith much must be left." See also *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586.

In the Pitts Case and other *"equal facilities"* cases like it, the Court had before it, insofar as enforcement is concerned, a much less complicated problem than the present problem of integration of races. The magnitude and complexity of the integration problem dictates a legislative solution.

In the enactment of appropriate legislation under Section 5 of the Amendment, Congress could, and probably would, recognize the necessity of allowing school officials wide latitude of administrative discretion under the supervision of a federal agency which would guarantee ultimate integration. Congress could make adequate provi-

sions for variations in such matters as geographical peculiarities, increasing or decreasing enrollment in particular districts, ratios of enrollment as between white and negro children, population shifts and any other factors which Congress might consider to be relevant.

Under Section 5, Congress would undoubtedly have power to fix a definite future date for complete integration in the several districts which have heretofore operated under the segregated system; or Congress might provide that integration must be completed in all districts within a reasonable time — such reasonable time to be determined in the manner prescribed by Congress.

As said by Mr. Chief Justice Stone in *Coleman* v. *Miller*, 307 U. S. 433, 453,

> "The question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

It is submitted that so long as Congress confines its "corrective" legislation to state action which infringes the Equal Protection and Due Process Clauses of the

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Fourteenth Amendment, Congress would be the "guardian of its own conscience" as to what legislation on the school integration subject is more or less "appropriate." In fact, it has been noted that in other fields it has not been uncommon for Congress to leave detailed administration to state control and discretion so long as such control and discretion are kept within the framework dictated by federal law. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, and *Parker* v. *Brown*, 317 U. S. 341.

The Constitution has conferred upon Congress the power to secure equal educational opportunities in the public schools for all children regardless of race. If Congress has failed and should continue to fail in exercising its powers whereby equal educational opportunity is denied by reason of state laws "the remedy will ultimately be with the people." "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove* v. *Green*, 328 U. S. 549, 556.

It is a matter of particular interest here that on the very same day this Court decided the school segregation cases (May 17, 1954) the Court also decided a very important case arising under the Federal Tort Claims Act, 60 Stat. 842. The case was *United States* v. *Gilman*, 347 U. S. 507. In construing the act, the unanimous Court, through Mr. Justice Douglas said, 347 U. S. at 511.

> "Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must

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> be weighed and appraised. That function is more appropriately for those who write the laws, rather than those who interpret them."

In the instant cases the Court is most certainly dealing with "a complex of relations" between the federal government on the one hand and the state governments on the other. The specific problem of implementing Section 1 of the Fourteenth Amendment as interpreted by this Court is a matter on which Congress has not taken a position over a period of eighty-six years and presents serious "questions of policy." The selection of policy relating to the integration of the races in public schools "involves a host of considerations that must be weighed and appraised." This Court should, in some appropriate manner, leave the details of the solution of the problem "to those who write the laws."

CONCLUSION

The point which is urged here with most emphasis is that a decree of this Court ordering *immediate* integration of the white and negro children would have a most disastrous effect upon the public school system of Arkansas. Likewise, it would most seriously disrupt the efforts of the leaders of both races in solving the racial problem in Arkansas in all its various aspects. No person or court can predict at this time what the consequences would ultimately be. There is no need for immediate integration in the public schools. It is not required by the Constitution.

The problem of integration of races in the public schools is of such magnitude that it can be solved effectively only by a *gradual* process which would vary from locality to locality. It is probably safe to assert at this time that no person or group of persons — not even any court — has formulated any definite plan of integration

Appendix A

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which would operate successfully in the school districts of Arkansas. As to the four cases now before the Court, the plan for integration in the districts which would be directly affected by those cases must, for the time being at least, be formulated, developed and finally concluded under the supervision and control of the courts of first instance. The decrees of this Court should accord to the lower courts the very widest range of discretion in bringing about integration in a manner which will promote, rather than retard the ultimate solution of the whole problem.

Finally and most earnestly, it is urged that this Court, by a supplemental opinion, point out in no uncertain terms that the integration problem is one which should be solved by Congress under Section 5 of the Fourteenth Amendment. The American system of government being what it is, this Court cannot compel Congress to act. But certainly this Court can, by some appropriate suggestion, bring about prompt and appropriate action by that branch of the government in which the people themselves, by adoption of the Fourteenth Amendment, lodged the power to adopt the appropriate plan to correct the conditions which, so this Court has said, the states have brought about in violation of the Amendment.

If the powers of this Court were not limited by the Constitution, the proper decrees of this Court in the pending cases would be to "remand the cases" *to Congress* with directions to take appropriate action. Lacking the power to *command* Congress, the next best thing would be a most urgent *invitation* to Congress from this Court. It is such a course which this Court is asked to adopt to the very limit of its power. If the Court complies with this request, then the solution of the problem will rest where it

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was intended by the Constitution that it should rest—with the Congress.

November 15, 1954.

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APPENDIX

ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Arkansas . . .	3,630	1,360	4,990	$ 891,277	$ 732,917
Ashley	3,963	2,367	6,330	1,018,902	895,782
Baxter	2,148	xxx	2,148	326,545	286,029
Benton	7,443	1	7,444	1,199,694	1,046,447
Boone	3,516	xxx	3,516	488,271	483,435
Bradley	2,064	932	2,996	479,622	454,240
Calhoun	1,056	592	1,648	286,115	263,004
Carroll	2,240	xxx	2,240	330,165	315,957
Chicot	2,461	3,053	5,514	837,044	666,743
Clark	3,430	1,569	4,999	719,768	644,724
Clay	5,899	xxx	5,899	712,092	695,944
Cleburne . . .	2,466	xxx	2,466	273,697	257,370
Cleveland . . .	1,546	526	2,072	353,646	333,275
Columbia . . .	3,679	2,807	6,486	1,010,188	927,011
Conway	2,721	1,211	3,932	535,174	489,141
Craighead . . .	11,264	295	11,559	1,502,603	1,389,577
Crawford . . .	5,147	87	5,234	647,874	635,714
Crittenden . .	4,012	6,909	10,921	1,254,324	1,052,578
Cross	4,106	1,985	6,091	797,101	731,553
Dallas	1,659	1,221	2,880	467,792	430,774
Desha	3,426	3,078	6,504	824,451	730,117
Drew	2,237	1,366	3,603	544,724	463,941
Faulkner . . .	3,981	612	4,593	633,314	620,258
Franklin . . .	3,033	38	3,071	408,118	376,237
Fulton	1,723	xxx	1,728	243,406	232,057
Garland	8,045	910	8,955	1,449,747	1,392,016
Grant	2,121	203	2,324	381,496	364,546
Greene	6,608	xxx	6,608	856,064	781,482

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ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Hempstead . .	2,965	2,355	5,320	783,593	707,316
Hot Spring . .	4,860	744	5,604	1,020,340	877,411
Howard	2,333	809	3,142	511,605	449,967
Ind'p'nd'nce .	4,723	77	4,800	637,999	593,318
Izard	2,093	14	2,107	240,407	224,549
Jackson	5,005	904	5,909	824,448	766,556
Jefferson . . .	8,869	8,025	16,894	2,353,543	2,033,288
Johnson	3,159	41	3,200	450,995	434,097
Lafayette . . .	1,629	1,614	3,243	560,538	480,749
Lawrence . . .	4,857	55	4,912	732,762	670,184
Lee	2,316	3,552	5,868	626,368	537,960
Lincoln	1,744	1,887	3,631	544,104	470,376
Little River .	1,799	964	2,763	438,760	393,134
Logan	3,230	169	3,399	558,614	482,709
Lonoke	4,518	1,428	5,946	829,476	723,716
Madison	2,640	xxx	2,640	277,237	266,346
Marion	1,516	xxx	1,516	254,566	232,608
Miller	5,927	2,106	8,033	1,143,452	1,027,337
Mississippi . .	13,218	4,789	18,007	2,366,353	2,302,446
Monroe	2,394	2,176	4,570	526,483	483,524
Montgomery	1,416	3	1,419	284,030	232,634
Nevada	1,893	1,498	3,391	588,702	494,588
Newton	1,946	xxx	1,946	220,148	212,226
Ouachita . . .	4,781	3,637	8,418	1,336,720	1,095,448
Perry	1,297	48	1,345	221,272	190,383
Phillips	4,294	6,409	10,703	1,132,056	1,036,507
Pike	2,003	74	2,077	348,979	304,222
Poinsett	8,022	694	8,716	1,035,175	972,903
Polk	2,931	xxx	2,931	534,865	439,619
Pope	4,270	123	4,393	608,356	589,653

ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Prairie	2,296	575	2,871	433,500	413,484
Pulaski	27,695	9,088	36,783	6,413,057	5,871,522
Randolph . . .	2,808	31	2,839	374,322	337,164
Saline	4,800	88	4,888	791,254	729,381
Scott	1,564	xxx	1,564	295,193	254,689
Searcy	2,200	xxx	2,200	278,123	266,129
Sebastian . . .	12,400	903	13,303	2,138,442	2,023,826
Sevier	2,264	264	2,528	479,528	376,536
Sharp	2,345	xxx	2,345	328,387	308,232
St. Francis . .	3,740	5,300	9,040	948,998	886,075
Stone	1,590	xxx	1,590	194,428	182,477
Union	7,524	4,325	11,849	2,264,543	1,892,648
Van Buren . .	1,960	17	1,977	268,505	256,415
Washington .	9,299	64	9,363	1,262,843	1,213,977
White	7,817	302	8,119	1,230,306	1,160,193
Woodruff . . .	2,552	1,946	4,498	553,958	544,544
Yell	2,910	90	3,000	539,774	477,755
TOTAL	314,041	98,310	412,351	$60,261,321	$54,618,690